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No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE BENDIX CORPORATION (RESEARCH LABORATORIES DIVISION),

Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 64

THE BENDIX CORPORATION,
(Research Laboratories Division),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 20, 1962.

Citations to Opinions Below.

The opinion of the Court of Appeals (Appendix B, *infra*, B-1 to B-4) is reported at 299 F. 2d 308 (6th Cir.,

1962). The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 34-36a)* are reported at 131 NLRB 599 (1961).

Jurisdiction.

The judgment of the Court of Appeals was dated and entered on February 20, 1962. Rehearing was denied on April 30, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and under Section 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. §160(e).

Questions for Review.

1. Did the review by the Court of Appeals of the sufficiency of evidence to support the Board's findings of fact "in the light of the credibility accorded by the Trial Examiner to four of respondent's witnesses" comply with the standards of review set forth in *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474?

2. Did the determination by the Court of Appeals that, reviewing the evidence "in the light of the credibility accorded by the Trial Examiner to four of respondent's witnesses", there were conflicting inferences with respect to the reasons for Hunt's discharge satisfy the standards of review set forth in *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474?

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* (R. a) refers to the Appendix to the brief of the petitioner in the court below; (R. b) refers to the Appendix to the brief of the respondent in the court below; copies of both appendices have been filed pursuant to Rule 21(4) of this Court.

Statutes Involved.

The statutes involved are the National Labor Relations Act, as amended, 29 U. S. C. §§157, 158, 160(c) and (e) and the Administrative Procedure Act, 5 U. S. C. §1009. The relevant portions of these provisions are printed in Appendix A, *infra*, pp. A-1 to A-2.

Statement.

This is a proceeding pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. §160(e) for enforcement of an order of the National Labor Relations Board entered under Sections 8(a)(1) and (3) of the Act, 29 U. S. C. §158(a)(1) and (3). The order directed petitioner to cease and desist from activities found to be in violation of the Act and to reinstate with back pay a discharged employee, Harold L. Hunt.

The findings of the Trial Examiner, which were adopted by the Board, with respect to the reinstatement of Hunt expressed belief in the testimony of Hunt and another employee, Mast, and disbelief in the testimony of Security Supervisor Beksa and Assistant Group Leader Scarmeas as to Hunt's conduct for which he was discharged and disbelief in the testimony of Superintendent Simo, who recommended discharge, and Personnel Director Capsalis, who discharged Hunt.

The Court of Appeals said in its opinion, *infra*, Appendix B, pp. B-2 to B-4:

> "• • • Two witnesses for respondent testified about Hunt's actions and statement at the time when the pivot pin broke, which, if true, fully justified his immediate discharge. Membership in a union does

not prevent an employer from discharging an employee for cause. [Citing cases]

"However, the Trial Examiner stated that he placed no reliance whatsoever on the credibility of these two witnesses and that 'their version of how and what caused the tone tray to break is a complete fabrication.' He explained in some detail his reasons for this conclusion. He also expressed his disbelief in the testimony of the Personnel Director and Respondent's Superintendent with respect to the reason for Hunt's discharge, again giving persuasive reasons for this conclusion. * * *"

The Court then quoted from the finding and conclusion of the Examiner which was adopted by the Board and concluded by saying:

"It is well settled that the credibility of witnesses and the reasonable inferences to be drawn from the evidence are matters for determination by the Trial Examiner and the Board. *United Fireworks Mfg. Co.* v. *National Labor Relations Board, supra*, 252 F. (2) 428, 430, C. A. 6th; *National Labor Relations Board* v. *Ridge Tool Co.*, 151 F. (2) 947, 948, C. A. 6th.

"The evidence in this case, viewed in the light of the credibility accorded by the Trial Examiner to four of respondent's witnesses, is such as would justify conflicting inferences with respect to the reason for Hunt's discharge. Under such circumstances we are not permitted to weigh the evidence, resolve its conflicting inferences, nor draw our own inferences therefrom. The Board's choice between two conflicting views may not be set aside even though the court would justifiably have made a different choice had the matter been before it *de novo*. *National Labor Relations Board* v. *Nabors*, 196 F. (2) 272, 275, C. A. 5th; *National Labor Relations Board* v. *Ford, supra*, 170 F. (2) 735, 739, C. A. 6th; *Old King Cole* v. *National Labor Relations Board*, 250 F. (2) 791, C. A. 6th."

The Court, as appears from its opinion, felt itself powerless, in view of the credibility findings of the Examiner and the Board, to take any other action than to acquiesce in the Board's findings of fact and inferences and to direct enforcement of the Board's order.

It is submitted that it was the duty of the Court of Appeals under *Universal Camera Corp. v. Labor Board*, 340 U. S. 474 (1951), to give effect to the evidence in the record which was opposed to the Board's view and giving such effect necessarily included power to determine in this case that the Examiner and the Board credited the wrong witnesses and drew the wrong inferences. It is submitted that the power of the Examiner and the Board to achieve a result deemed by them to be desirable by the crediting of witnesses and drawing of inferences from the testimony credited is subject to the power of the Court of Appeals to determine whether the evidence in the record considered as a whole is sufficient to permit the result reached. The deference which the Court of Appeals gave to the credibility findings of the Examiner and the Board in this case is wholly inconsistent with the duty of the Court of Appeals to consider the whole record including the evidence opposed to the Board's view as well as the evidence in its support.

Reasons for Granting the Writ.

1. The question of the scope of judicial review under *Universal Camera Corp.* v. *Labor Board, supra*, of findings of fact made by trial examiners and affirmed by the National Labor Relations Board involving the credibility of witnesses is an important question of Federal Law which has not been but which should be settled by this Court.

The following cases illustrate the uncertainty which now prevails as to the extent of the deference which a

reviewing court is required to give to credibility determinations by the National Labor Relations Board.

In a recent case before the Court of Appeals for the Second Circuit, *N.L.R.B.* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2nd Cir., 1961), Circuit Judge Friendly gave a scholarly discussion of the scope of judicial review under the *Universal Camera* decision. The court indicated that perhaps the Circuit Court of Appeals for the Second Circuit had displayed greater self-abnegation than Congress had desired, but held that from the standpoint of the Second Circuit the principle to be applied was the test laid down in *Labor Board* v. *Columbian Co.*, 306 U. S. 292 (1939), that evidence is substantial if it is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (p. 300). This present Second Circuit test is narrower than that suggested by Judge Soper in *N.L.R.B.* v. *Southland*, 201 F. 2d 244 (4th Cir., 1951), but conforms to the opinion of Chief Judge Parker in that case. It is submitted that it is impossible to reconcile the motion for the direction of a verdict test with the duty of the Court under *Universal Camera* to consider the record as a whole including the evidence opposed to the Board's view.

In *Farmers Co-operative Co.* v. *N.L.R.B.*, 208 F. 2d 296 (8th Cir., 1953), the Court of Appeals for the Eighth Circuit plainly indicated that it considered that it was necessary under the *Universal Camera* test for the court to consider the evidence opposed to the Board's view. The court said (p. 303):

> "In considering the evidence on the record as a whole it is apparent that the examiner and the Board did not credit the testimony of nine of the witnesses who testified at the hearing. [the court named them] * * * The testimony of William

> Dudley [the discharged employee] was the only testimony believed.
>
> In so finding it seems clear to us that the examiner did not fairly consider the evidence. * * *
>
> Since it is the duty of this Court to determine insofar as is humanly possible what the truth is (Universal Camera Corp. *v.* National Labor Relations Board, *supra*), we have read the entire record with that duty in mind and can reach no conclusion other than that the examiner and the Board erred in finding and holding that Mr. Thomas, manager, and Mr. Porter, plant superintendent, lied when they testified in reference to Mr. Dudley's conduct on March 7, 1952. * * *"

The Court of Appeals for the Fourth Circuit in *N.L.R.B. v. Croscil Curtain Co. & Durham Drapery Co.*, 297 F. 2d 294 (4th Cir., 1961) considered the Trial Examiner's report which had been approved by a majority of a three-man board, in which the court said:

> "* * * The Trial Examiner can place no reliance upon any of such testimony, and finds no merit in the reason for the discharge advanced by the Respondent. * * *"

The court examined the record and held that it could not be described as "confused, contradictory and inconsistent" and that the characterization of the discharge upon which the dismissal was based as "trumped up" was not justified. The court said (p. 297):

> "Taking the testimony as a whole into consideration we do not think that the Examiner was justified in sweeping aside the testimony as to Britt's conduct as unworthy of belief and insufficient to warrant serious consideration. On the contrary the probabilities are strong that the preponderance of

> the testimony with respect to Britt's conduct correctly describes the behavior of an eager partisan who aspired to be a leader of the women and induce them to join the Union, and resented the opposition of Godwin and the other women who composed a majority of the workers in the plant. We recognize that it is for the Board and not for this court to pass on the credibility of the testimony, but it is the duty of the Board as set out in Section 10(e) of the statute to base their findings on 'substantial evidence on the record considered as a whole', and we do not think that has been done in this case with respect to the discharge of Britt. * * *"

In *N.L.R.B.* v. *United Brass Works, Inc.*, 287 F. 2d 689 (4th Cir., 1961), the Court of Appeals recognized that it was not its function in labor board cases to pass upon the credibility of witnesses. However, the court referred with approval to the Fifth Circuit decision in *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 222 F. 2d 341 (5th Cir., 1955), saying (p. 691):

> "* * * Where evidence has been disregarded or eliminated by the casual expedient of discrediting an employer's witnesses, the result is that the Trial Examiner's report and the Board's findings will not be accorded the presumption of correctness usually attributed to the trier of fact. * * *"

The court was confronted in *United Brass Works* with a conflict between York (the discharged employee) and one Mandelkorn (the company's plant superintendent). Mandelkorn denied having made a threat. The Board adopted the Trial Examiner's finding that the threat had been made. The court said (p. 694):

> "Again acknowledging recognition of the rule as to a redetermination of the credibility of witnesses on appeal, we cannot overlook the further rule that

> a Trial Examiner's findings 'are to be considered along with the consistency and inherent probability of testimony.' Universal Camera Corp. v. N.L.R.B., 1951, 340 U. S. 474, 496, 71 S. Ct. 456, 469, 95 L. Ed. 456. * * *"

The Court thought it was sufficient to say that it was unable to find any evidence to support the finding of the Board in this particular case other than York's own self-serving declaration, stating (p. 695):

> "* * * Upon the whole record we determine that there is not substantial evidence to support a finding that York had ever been threatened with discharge, or that he was, in fact, discharged, because of his union membership or activity."

In a footnote the court said (p. 695):

> "The Trial Examiner did not rule directly upon the obvious conflict in respect to this alleged threat by Mandelkorn. Instead of passing upon the credibility of the witnesses in this particular it was simply held, in reliance upon York's testimony alone and ignoring evidence to the contrary, that a prima facie case of discrimination had been established."

The Ninth Circuit took an extreme position on the other side in *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (9th Cir.) *aff'd* on a different ground, 346 U. S. 482 (1953). The Circuit Court said (p. 86):

> "Respondent maintains that the trial examiner was obliged to accept as true statements made by its own witnesses when those statements were not contradicted. It says: 'It is well settled law that where a witness' testimony is not contradicted, a trier has no right to refuse to accept it.' This is an ancient fallacy which somehow persists despite the courts' rulings to the contrary. * * *"

The Ninth Circuit, it is submitted, overlooked the fact that it is impossible to lay down a general rule that will be applicable in all cases. Sometimes uncontradicted testimony is so clear and convincing that no question of credibility is presented for consideration by a jury. At other times uncontradicted testimony may raise a reasonable doubt when considered with other circumstances and a question is presented for the jury. Numerous cases in connection with jury trials are cited in the notes in 8 A. L. R. 796; 72 A. L. R. 27 and 62 A. L. R. 2d 1191.

2. The decisions of this Court in *Walton* and *Florida Citrus, supra,* applying the admonitions of *Universal Camera* to credibility determinations emphasize the importance of clarifying the scope of judicial review. In *Florida Citrus* this Court raised the question whether the Fifth Circuit had not gone too far in refusing to sustain the trial examiner in crediting Holly instead of Stevenson as to what was said in a conversation between them. But the court did not, as we interpret the opinion, hold that in no case can a court interfere where there is a conflict in testimony. In *Walton* this Court raised the question whether the Fifth Circuit had not gone too far in the requirements of circumstantial evidence necessary to support a finding of unlawful motivation. But manifestly some evidence must be supplied, and it was not held that mere disbelief in the testimony of an employer as to the reason for a discharge takes the place of affirmative evidence. The decisions of this Court in *Walton* and *Florida Citrus* are reasons, it is submitted, for granting the writ to clarify the law, not for denying it on the ground that the law has been clarified by these decisions.

3. There is an apparent conflict between the decision of the Court of Appeals for the Fifth Circuit in *N. L. R. B.*

v. *Redwing Carriers, Inc.*, 284 F. 2d 397 (5th Cir., 1960), and the Court of Appeals for the Sixth Circuit in the instant case as to whether the motivation for a discharge should be judged from the facts as the person making the discharge understood them or whether unlawful motivation may be inferred from the failure of the employer to justify the discharge in fact. As we interpret the decision of the Court of Appeals in the instant case, the burden was in effect upon the petitioner to justify the discharge. When it was unable to do so, because the Examiner refused to credit its witnesses, there were conflicting inferences as to the reason for the discharge concerning which the Court of Appeals was not authorized to express an opinion.

In *Redwing Carriers, Inc.*, the Court of Appeals for the Fifth Circuit held that the motivation for a discharge must be judged upon the facts as the person making the discharge understood them and not upon the basis of the employee's testimony at the subsequent trial. The Examiner in the present case said at the hearing (R. 3-4b):

> "Trial Examiner: I wish to call the General Counsel's attention to the fact that assuming without at this point conceding that the discriminatee was in no way responsible for the breaking of this post, that this still does not meet the burden of proof that is required of you to show that motivation for discharge was something other than the breaking of the post. You understand what I mean?
>
> Mr. Rallis: I understand what you are getting at.
>
> Trial Examiner: If the company was under a reasonable belief or an unreasonable belief that your client was negligent—not your client, but Mr. Hunt was negligent in connection with this, and discharged in furtherance of that belief, it would still not be a violation of Section 8(a)(3) of the Act. You understand?

Mr. Rallis: I understand the legal implication you are talking about.

Trial Examiner: I just wanted to point that out before we proceeded any further."

The Examiner's report cannot be understood except by realizing that the Examiner was attempting to find that Beksa and Scarmeas knew the "true" facts, i.e., those found by the Examiner, and fabricated, at the hearing, a version of the breaking of the tone tray to provide an excuse for discharging Hunt. The Examiner also was attempting to find that Simo and Capsalis could not have relied upon reports from Beksa and Scarmeas that Hunt had abused the tone tray because neither Simo nor Capsalis made an investigation of the kind deemed appropriate by the Examiner. Therefore, the Examiner concluded that Beksa and Scarmeas could not have reported that Hunt had abused the tone tray but must have reported that the tray had broken through no fault of Hunt. In drawing this conclusion the Examiner ignored the uncontradicted testimony of Beksa and Scarmeas that they reported to Simo that Hunt had abused the tone tray and the uncontradicted testimony of Simo that such reports had been made to him. He also ignored the testimony of Hunt himself that Beksa reported to Capsalis at the time Hunt was discharged that Hunt had used more force than was necessary on the tone tray.

The rule is well settled that the disbelief in testimony does not authorize a finding contrary to what the witness testified to.

In *Jones on Evidence*, 2d Ed., §2468 it is stated:

> "The mere fact that the testimony of a witness is not believed does not of itself warrant a finding in direct opposition to such testimony. For example a jury is not warranted in assuming that because they

decide the defendant's narrative is false the converse of such narrative must be true, without further examination of the testimony."

In *Wallace* v. *Berdell*, 97 N. Y. 13 (1884), the question was as to the delivery of a trust deed. Witnesses were discredited by the Trial Judge and the Court of Appeals held:

"* * * Even if the inconsistencies and circumstances relied upon as justifying the court in rejecting the testimony of those witnesses were sufficient for that purpose, the discrediting of their testimony did not authorize the court to infer affirmatively the contrary of that which they testified to."

In *Miller* v. *Smith*, 20 App. Div. 507 (1898), the court said (pp. 310, 511):

"* * * while the trial court was at liberty to discredit the testimony of the witnesses Hallenbeck and Smith, yet, the mere fact that the testimony of a witness as to a fact is not believed does not of itself warrant a finding to the direct opposite of such testimony. * * *"

In *Town of Wakefield* v. *American Surety Company*, 209 Mass. 173 (1911), the court said:

"* * * Disbelief of denials of facts which a party must prove is not the equivalent of affirmative testimony in support of those facts. * * *"

See also *Morse* v. *Hill*, 136 Mass. 60 (1883).

There were speculations by Judges Learned Hand and Frank in *Dyer* v. *MacDougall*, 201 F. 2d 265 (2nd Cir., 1952), as to whether a party having the burden of proof could sustain it by reason of the court's disbelief in testimony on the ground of demeanor. These speculations have acquired considerable importance due to the quotation from *Dyer* v.

MacDougall by this Court in *Walton Mfg. Co.* v. *Labor Board* and *Labor Board* v. *Florida Citrus Canners Cooperative*, both decided *sub nom. Walton Mfg. Co.* v. *Labor Board*, 369 U. S. 404 (1962), but we know of no decision where these speculations have been applied, and in *Dyer* v. *MacDougall* itself summary judgment was granted against the party having the burden of proof without giving him an opportunity to examine the witnesses for the defendant.

Applying these principles and assuming for the purpose of argument that the Court of Appeals was correct in treating the finding of the Examiner that Hunt had not abused the tone tray as not subject to judicial review, there still remains the basic question of whether there was substantial evidence on the record as a whole to support the ultimate finding that the reason for the discharge was to discourage the remaining employees from their adherence to the union.

4. The Examiner's findings expressing disbelief in the testimony of Beksa, Scarmeas, Simo and Capsalis for the reasons set forth in the report had no rational basis in the record and were purely arbitrary. The deference given to them by the Court of Appeals was not authorized by *Universal Camera* which stated that they be given no more "weight than in reason and in the light of judicial experience they deserve" (p. 496).

In jury cases the question whether the jury based its belief on certain testimony and disbelief on other testimony for good or bad reasons does not arise because the jury is not required to give any reasons for its beliefs or disbeliefs. The court in jury cases does, however, attempt to exercise control over beliefs and disbeliefs through its charge and its comments on the evidence. There is no doubt that if a judge charged a jury that if it could find any inconsistency

or contradiction in the testimony of a witness it might disregard a witness' entire testimony, a verdict rendered on the basis of such a charge would be set aside by an appellate court. The maxim *falsus in uno, falsus in omnibus* has no application except in cases of wilful falsehood on a material point.

In the case of a trial without a jury, the court's opinion usually contains reasons for the crediting or discrediting of testimony. No finding of disbelief could possibly be sustained under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. §52(a), if the trial court gave as reasons for disbelief in the testimony of Beksa, Scarmeas, Simo and Capsalis the reasons which were given by the Trial Examiner in his report.

In *Gung You* v. *Nagle*, 34 F. 2d 848 (9th Cir., 1929), the immigration authorities ordered the deportation of a Chinese boy who claimed to be an American citizen. The court considered the effect of discrepancies in testimony as a justification for refusal to believe the testimony in chief, saying (p. 852):

> "• • • The method as ascertaining the credibility of a witness has been known to the law for centuries, and our juries, when called upon to pass upon testimony, are fully instructed thereon. Aside from the appearance of the witness, his demeanor on the stand, and the reasonableness of his testimony, and his character, as determined by his manner of testifying or by evidence of a good or bad reputation, he can only be impeached by evidence of contradictory statements made out of court or in court on material matters. This is the law's method of measuring the credibility of witnesses."

The court held that the discrepancies relied upon as a justification for disregarding the testimony given were insuffi-

cient for the purpose and that the professed disbelief was purely arbitrary. The order denying the writ of habeas corpus was reversed.

5. The decision of the Court of Appeals holding in effect that the credited testimony permitted conflicting inferences as to the reason for Hunt's discharge does not satisfy the requirements of *Universal Camera*. One of the reasons for the new legislation reviewed in *Universal Camera* was to prevent for the future such decisions as *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105 (1942), which were deemed by Congress to express too great deference to the drawing of inferences by the Board from a too slender foundation of fact.

Conclusion.

For the reasons set forth above, it is respectfully urged that this petition for certiorari be granted and that a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Dated: July 27, 1962.

Respectfully submitted,

ALLEN S. HUBBARD,
Attorney for Petitioner, The Bendix Corporation (Research Laboratories Division).

Appendix A.

Relevant Portions of Statutes.

5 U. S. C., §1009:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> • • • • • •
>
> "(e) • • • It [the reviewing court] shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; • • • In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

29 U. S. C., §157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U. S. C., §158:

> "(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

29 U. S. C., §160

* * * * * *

"(c) * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * * * *

"(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Appendix B.

The Opinion of the United States Court of Appeals for the Sixth Circuit, dated and entered on February 20, 1962.

Before: MILLER, Chief Judge, MCALLISTER and O'SULLIVAN, Circuit Judges.

MILLER, Chief Judge.

The National Labor Relations Board seeks enforcement of its order of May 18, 1961, directing the respondent, The Bendix Corporation, Research Laboratories Division, to cease and desist from certain unfair labor practices found by it to exist in violation of Section 8(a)(1) of the Act, to reinstate an employee, Harold L. Hunt, found by the Board to have been discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, to make him whole for any loss of earnings suffered as a result of such discharge, and to post appropriate notices.

The Trial Examiner found, which the Board adopted, that the interrogation by respondent's Personnel Director of Respondent's employees concerning their union membership and desires, and the implied promises of benefit and threat of reprisal contained therein constituted interference, restraint and coercion of the employees' rights guaranteed by the Act and constituted unfair labor practices within the meaning of Section 8(a) (1) of the Act. This finding is supported by substantial evidence on the record considered as a whole, and is accepted by us. *National Labor Relations Board* v. *Ford*, 170 F. (2) 735, 738, C. A. 6th; *United Fireworks Mfg. Co.* v. *National Labor Relations Board*, 252 F. (2) 428, C. A. 6th; *National Labor Relations Board* v. *Beatrice Foods Co.*, 183 F.(2) 726, 728, C. A. 10th.

The circumstances immediately preceding the discharge of employee Hunt are as follows: Hunt was operating a Xerox Processor, a machine used to produce a "master" of

written or printed material from which copies can be made on an offset press. In an operation known as "cascading," a metal "tone" tray is removed from the machine, attached by pivot pins welded to its sides to an extension arm of the machine, and agitated to distribute the tone evenly. While Hunt was "cascading" a tray a pivot pin pulled away from the side of the tray. What occurred immediately thereafter is in dispute under the evidence, except that about five minutes before quitting time that day, Personnel Director Capsalis called Hunt to his office and discharged Hunt for "wilful destruction of company property."

Hunt was one of the four rank-and-file employees in the reproduction unit who signed a union authorization card and who told the Personnel Director that he favored representation by the Union. The Board contends that in view of respondent's hostility to unionization and its knowledge of Hunt's adherence to the Union, it could properly infer that respondent's real reason for discharging Hunt was to discourage its other employees from continuing in their adherence to the Union by making an example of him. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 602; *National Labor Relations Board* v. *Ford, supra,* 170 F.(2) 735, 739 C. A. 6th.

On the other hand, respondent's evidence was that Hunt was a careless and inefficient worker, that three pieces of equipment had been previously broken while he was handling them, that he had been cautioned twice about his work habits, and that one of respondent's supervisors had previously suggested that Hunt be discharged. Two witnesses for respondent testified about Hunt's actions and statement at the time when the pivot pin broke, which, if true, fully justified his immediate discharge. Membership in a union does not prevent an employer from discharging an employee for cause. *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. (2) 485, 490-491, C. A. 6th; *United Fireworks Mfg. Co.* v. *National Labor Relations Board, supra*, 252 F. (2) 428, 430, C. A. 6th.

However, the Trial Examiner stated that he placed no reliance whatsoever on the credibility of these two wit-

nesses and that "their version of how and what caused the tone tray to break is a complete fabrication." He explained in some detail his reasons for this conclusion. He also expressed his disbelief in the testimony of the Personnel Director and respondent's Superintendent with respect to the reason for Hunt's discharge, again giving persuasive reasons for this conclusion. He made the following finding, which was adopted by the Board.

> "On the entire record including the numerous contradictions in Capsalis' testimony, my disbelief of the testimony of Beksa, Scarmeas, Simo and Capsalis, the peremptory manner in which Hunt was discharged without investigation, my conclusion that Hunt did not abuse the Xerox Processor, Hunt's known adherence to the Union and Respondent's hostility to the Union representation of its reproduction employees, I find and conclude that the broken tone tray was utilized as a pretext by Respondent to rid itself of Hunt to discourage its other employees from continuing in their adherence to the Union. Accordingly, I find and conclude that by its discharge of Hunt, Respondent discriminated in respect to hire and tenure of its employees, thereby discouraging membership in the Union in violation of Section 8 (a) (3) and (1) of the Act.

It is well settled that the credibility of witnesses and the reasonable inferences to be drawn from the evidence are matters for determination by the Trial Examiner and the Board. *United Fireworks Mfg. Co.* v. *National Labor Relations Board, supra*, 252 F. (2) 428, 430, C. A. 6th; *National Labor Relations Board* v. *Ridge Tool Co.*, 151 F. (2) 947, 948, C. A. 6th.

The evidence in this case, viewed in the light of the credibility accorded by the Trial Examiner to four of respondent's witnesses, is such as would justify conflicting inferences with respect to the reason for Hunt's discharge. Under such circumstances we are not permitted to weigh

the evidence, resolve its conflicting inferences, nor draw our own inferences therefrom. The Board's choice between two conflicting views may not be set aside even though the court would justifiably have made a different choice had the matter been before it *de novo*. *National Labor Relations Board* v. *Nabors*, 196 F. (2) 272, 275, C. A. 5th; *National Labor Relations Board* v. *Ford, supra*, 170 F. (2) 735, 739, C. A. 6th; *Old King Cole* v. *National Labor Relations Board*, 250 F. (2) 791, C. A. 6th.

Enforcement of the Board's Order is decreed.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 287

THE BENDIX CORPORATION
(RESEARCH LABORATORIES DIVISION),
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 299 F. 2d 308. The Board's decision and order are reported at 131 NLRB 599 (R. 34a-36a).[1]

[1] References designated "R." are to the Appendix to the Board's brief in the court below.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1962 (Pet. App. B). Rehearing was denied on April 30, 1962. The petition for a writ of certiorari was filed on July 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the finding of the National Labor Relations Board that petitioner discharged employee Harold Hunt to discourage its other employees from adhering to the union, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix A to the petition.

STATEMENT

A. The Board's Findings of Fact

1. *Interference, restraint and coercion*

In March 1960, the four rank-and-file employees of petitioner's reproduction unit,[2] including Harold Hunt, attended a Union[3] meeting and signed cards

[2] A unit in the graphic arts department of petitioner's research laboratory (R. 11a).

[3] Local 9, Amalgamated Lithographers of America.

designating the Union as their collective bargaining representative (R. 12a; 19a-20a). By letter dated Friday, April 1, 1960, the Union requested petitioner to recognize it as the bargaining representative of its "lithographic production employees" (R. 12a; 41a). The following Tuesday, Personnel Director Aleck Capsalis called the four reproduction unit employees and their assistant supervisor, James Scarmeas, to a meeting. Capsalis told the assembled employees that they did not need representation by a "third party" and that he was surprised they wanted such representation. He then asked each employee if he favored representation by the Union. When each in turn answered that he wanted the Union to represent him, Capsalis asked what the "trouble" was. The employees complained that they had too much overtime work and suggested the purchase of an additional machine. Capsalis replied that under the law he could make no promises, but perhaps something could be worked out if the employees reconsidered their need for the Union. (R. 12a-13a; 43a-44a, 61a-63a.)

A few days later, Capsalis spoke separately to two of the employees in his office. Capsalis repeated to one that the employees did not need a "third party" to represent them (R. 13a-14a; 132a), and remarked to the other that, as an "intelligent" man, he "could see the disadvantages of a union" for a person who was not "planning to work as a lithographer" permanently (R. 13a; 63a-64a). On Tuesday, April 12, Capsalis discharged Hunt, allegedly for wilfully damaging a machine.

On Thursday afternoon, April 21, Superintendent Simo told the employees in the reproduction unit that they were spending too much time discussing the Union during their coffee breaks, that further discussions about the Union "must be done on their own time outside the Company premises," and that "drastic measures would be taken" against any employee who thereafter engaged in "these extra activities" at petitioner's premises (R. 12a; 115a-116a, 153a).

2. *The discharge of Harold Hunt*

As previously related, Harold Hunt was one of the four rank-and-file employees in the reproduction unit who signed a Union authorization card and who told Personnel Director Capsalis on April 5, 1960, that he favored representation by the Union. According to Hunt's testimony, credited by both the Trial Examiner and the Board, he was discharged a week later by Capsalis under the following circumstances:

On Tuesday, April 12, Hunt was operating a Xerox Processor, a machine used to produce a "master" of written or printed material from which copies can be made on an offset press. In an operation known as "cascading," a metal tray is removed from the machine, attached to an extension arm of the machine by pivot pins welded to its sides, and then agitated to distribute a developing powder (R. 19a). The cascading operation puts considerable stress on the pivot arrangement, and about noon, while Hunt was cascading a tray, a pivot pin pulled away from the side of the tray (R. 19a-20a; 47a). Hunt at once reported the mishap to Assistant Supervisor Scar-

meas, who examined the tray and then called the manufacturer to send a service man (R. 20a; 47a-48a, 64a-65a). After lunch, Hunt spoke to Supervisor Orvosh about the incident, suggesting to him that another piece of equipment be utilized in place of the broken tray (R. 20a; 49a-50a). Orvosh did not question Hunt about the cause of the break (R. 20a; 82a, 51a). About five minutes before quitting time that day, Personnel Director Capsalis called Hunt to his office and discharged him for "wilful destruction of company property" (R. 20a; 51a-52a, 143a).

Supervisors Scarmeas and Beksa gave a different version. They testified that they saw Hunt strike the tray twice with considerable force, and that this caused it to break. Moreover, according to them, when Hunt was asked why he had used such force, he was insolent (R. 20-21a; 90-91a, 105a). Similarly, Superintendent Simo and Personnel Director Capsalis testified that they discharged Hunt on being advised of his abuse of the tray (R. 25a-26a; 111a, 133a). The Trial Examiner did not believe this testimony, and his resolution of the conflict was accepted by the Board (R. 21a-28a, 34a).

B. The Board's Conclusions and Order

On the foregoing facts, the Board concluded that petitioner discharged Harold Hunt, not for destroying company property as it asserted, but to discourage its employees from continuing their adherence to the Union, thereby violating Section 8(a)(3) and (1) of the Act (R. 27a-28a, 34a). The Board

further concluded that petitioner violated Section 8 (a) (1) of the Act by coercively interrogating employees about their union activity, by promising them benefits if they would abandon such activity, by threatening them with economic reprisals if they did not do so, and by unduly restricting their right to discuss the Union at its premises (R. 15a-17a, 34a).

The Board's order (R. 34a-38a) requires petitioner to cease and desist from the unfair labor practices found, and from otherwise interfering with, restraining, or coercing its employees in the exercise of their rights under the Act. Affirmatively, the order requires petitioner to reinstate Harold Hunt with back pay, and to post appropriate notices.

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's order in full. Finding that the Examiner had given "persuasive reasons" for believing Hunt and not believing petitioner's witnesses, the court declined to upset his credibility determinations. Viewing the evidence in the light of these determinations, the court concluded that there was ample support for the Board's findings. (Pet. App. B.)

ARGUMENT

Petitioner's sole contention is that the Trial Examiner and the Board acted unreasonably in disbelieving the testimony of petitioner's witness to the effect that Hunt wilfully damaged company property and was discharged for that reason, and that the

court below erred in not setting aside this credibility determination (Pet. 5, 14-15). The determination, turning, as it does, only on the specific circumstances of this particular case, plainly does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[1] In any event, as the Trial Examiner's Intermediate Report, adopted by the Board, clearly shows (R. 21a-28a), the credibility findings rest on rational grounds and are entitled to stand.

---

[1] There is no substance to petitioner's contention that the court below deemed itself powerless to review the credibility findings of the Board and Trial Examiner. We submit that a fair reading of the court's opinion makes plain that the court examined those determinations, along with all the other evidence in the record, in reaching its conclusion that the Board's order was entitled to enforcement. To be sure, the court stated that "the credibility of witnesses and the reasonable inferences to be drawn from the evidence are matters for determination by the Trial Examiner and the Board" (Pet. App. B 3), but this does not indicate that the court was abdicating its reviewing function. It simply shows that the court was heeding the admonition in *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, that the reviewing court should not reweigh the evidence, nor, absent clear error, reverse the Examiner's credibility determinations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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